**IN THE**
**SUPREME COURT OF MISSOURI**

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| CHARLES MOORE, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. SC94277 |
| | ) | |
| | ) | |
| STATE OF MISSOURI | ) | |
| | ) | |
| Respondent. | | |

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY
TWENTY-FOURTH JUDICIAL CIRCUIT, DIVISION 2,
THE HONORABLE SANDRA MARTINEZ, JUDGE

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# APPELLANT'S SUBSTITUTE REPLY BRIEF

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## REPLY ARGUMENT

**(1) Adequacy of Pleading Regarding "Reasonable Trial Strategy."** The State argues "it should be presumed that counsel had a strategic reason for withdrawing the motion," for automatic change of judge, *citing McIntosh v. State*, 413 S.W.3d 320, 324 (Mo. banc 2013). Resp. Br. 10.

But the strong presumption in favor of counsel's "strategic choices" that are "made after a thorough investigation of the law and the facts" should apply after a hearing has been held. *McIntosh* states this presumption exists in the portion of the opinion relating to the standard of review, and no hearing was held in that case. However, *McIntosh*'s supporting authority was *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009) and *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006), cases where this Court evaluated counsel's testimony about their strategic reasoning after a hearing.

Appellant pleaded that the sentencing attorney's statements that the intake attorney had noted Appellant "did not request a change of judge" conflict with notes taken by the intake attorney that show two boxes checked on the intake form, that Mr. Moore did and did not want a change of judge, with a red line drawn through those marks and the word "no" written next to Judge Martinez's name. PCR L.F. 26-27. A hearing is necessary to decipher that writing and determine factually if the intake attorney made any errors in determining whether Appellant wanted a change of judge, as Appellant alleges.

The State also believes that the post-conviction motion did not adequately allege that there was no "reasonable trial strategy" behind the decision by the intake attorney to file and

then withdraw a change of judge motion on the day of arraignment. Resp. Br. 11. But in this case, involving public defenders, the Rule 32.07 change of judge motion was filed by an attorney covering a docket on the day of Appellant's arraignment. PCR L.F. 26-27. There is no meaningful "strategy" at this stage of the case, where the lawyer in question had just met Appellant. Appellant pleaded facts that counsel withdrew the motion the same day without Appellant's consent. L.F. 26-27. This case presents the question of whether this lawyer overrode, with no information about Appellant's case, Appellant's clear and reasonable direction that he did not want a certain judge.

**(2) Prejudice.** The thrust of the State's argument regarding prejudice is that "the mere fact . . . there would have been an automatic change of judge is not sufficient to establish *Strickland* prejudice." Resp. Br. 13. The State argues it is not enough to show the motion, if filed, would have been automatically granted. *Id.* According to the State, defendants whose attorneys ignore their wishes on this issue have an additional burden to show the judge in question was "actually biased." Resp. Br. 13, 16.

This overlooks the different burden on a party when an automatic change of judge is at issue. Rule 32.07(d). For an automatic change of judge, there is no requirement other than to file the motion on time. *Id.* The State's suggestion would require a post-conviction movant to prove that a judge is actually biased, where below there was no such burden. Such a suggestion seems designed to artificially and needlessly make a defendant's burden more difficult than logic and consistency would require. While the State's focus is on making a criminal defendant's burden as difficult as possible, this Court should consistently

apply the law and find that where a motion for change of judge would have been automatically granted and counsel was ineffective, there is no additional burden to prove a judge was "actually biased" against a defendant. Resp. Br. 13, 16.

The State points to *Matthews v. State*, 175 S.W.3d 110 (Mo. banc 2005). Resp. Br. 14. In that case, the appellant alleged that prejudice was presumed when counsel failed to object to the trial court not automatically transferring venue when a timely motion was filed. 175 S.W.3d at 114. In that case, this Court found the movant failed to "plead that anyone on the jury knew him, that any juror had heard anything about the case prior to trial, or that any juror was biased against him based on his race, gender, ethnicity, or any other trait." *Id.* Here, Appellant's claim is more specific than that in *Matthews*. At sentencing he told his attorney that he had been convicted of two robberies "here at this county" and Judge Martinez "was one of the prosecutors of [his] case back then, and that is why [he] did not want to be in front of [her]" to support his claim that he wanted a change of judge. Tr. 167. Neither Judge Martinez nor Ms. Sanders disputed Mr. Moore's statements. Tr. 167.

Further, Appellant pleaded that Ms. Sanders' statements that the intake attorney noted Appellant "did not request a change of judge" is in conflict with notes taken by that attorney reflecting both that Mr. Moore did want, and did not want, a change of judge, with a red line drawn through those marks and the word "no" written in red next to Judge Martinez's name. PCR L.F. 26-27; Tr. 167-68.

Additionally, *Matthews* was decided before the United States Supreme Court had yet clearly recognized that a criminal defendant has a right to reasonably effective counsel at all

stages of the proceedings, including before trial, regardless of whether the defendant ultimately receives an opportunity for a full and fair trial. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (relating to counsel's duty to convey a plea offer, regardless of the fairness of the eventual disposition of the case). Both *Matthews* and *Moss*, dealing with a request for an automatic change of venue, were concerned with the fairness of the defendants' eventual trial where it appeared the jury who heard the case was not biased. *Matthews*, 175 S.W.3d at 114 (citing *Moss v. State*, 10 S.W.3d 508, 513 (Mo. banc 2000)). Whether a later trial is fair is not the standard. *Frye*, 132 S. Ct. at 1407.

And unlike when a change of venue is at issue, there are practical limitations in exposing a judge's suspected bias, and possibly for that reason the automatic change of judge provision has more rigorous policy considerations that underlie it. In both criminal cases and civil actions, the right to disqualify a judge is "one of the keystones of our legal administrative edifice." *State ex rel. Mountjoy v. Bonacker*, 831 S.W.2d 241, 244 (Mo. App. S.D. 1992) (*quoting State ex rel. Campbell v. Kohn*, 606 S.W.2d 399, 401 (Mo. App. E.D. 1980)). "No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit his case in a court where the litigant sincerely believes the judge is incompetent or prejudiced." *Bonacker*, 831 S.W.2d at 244.

Further, for what was a relatively minor incident involving a display of temper in front of a parole officer, the judge in question sentenced Appellant very harshly and unlike in *Matthews*, prejudice can be ascertained from the record. The judge sentenced Mr. Moore to the maximum sentence of fifteen years for this enhanced class C felony, well more than

the State's recommendation of ten years. Tr. 155. She also ordered his sentence to run consecutively to another sentence. Tr. 159. At all relevant times, counsel was aware of Judge Martinez's prior history with Appellant when she was a prosecutor. PCR L.F. 26-28. Under the circumstances, trial counsel failed to act as reasonably competent trial counsel would have acted under the same or similar circumstances; additionally, based on the fact the judge gave Appellant the greatest sentence possible under the law and had history prosecuting him, there is a high probability another judge would have sentenced him differently.

Put simply, Appellant pleaded different facts than those in *Matthews* and *Moss* that would demonstrate what a reasonable attorney would have done under the circumstances, and a reasonable likelihood of prejudice. Proof of the "actual bias" the State demands is very difficult to demonstrate or prove conclusively. *See, e.g., State v. Kinder*, 942 S.W.2d 313, 321 (Mo. banc 1996) (no actual bias found when trial judge issued press release during re-election campaign disparaging minorities). Here we have a judge who previously prosecuted Appellant for robbery, who ultimately handed down a very lengthy sentence that was much longer than the State's requested sentence. PCR L.F. 26-28. Appellant reasonably asked for a different judge at an early stage of the case when only he knew the relevant facts and circumstances that supported the automatic change of judge motion.

The record in this case supports the facts alleged in Mr. Moore's amended motion that his reasonable wishes regarding an automatic change of judge were essentially ignored or overruled by an intake attorney with no explanation. His allegations were not

conclusively refuted by the record. A mistake has clearly been made and the cause must be reversed and remanded for an evidentiary hearing.

## CONCLUSION

Mr. Moore asks this Court to reverse and remand this case for an evidentiary hearing.

Respectfully submitted,

*/s/ Jessica Hathaway*

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## CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Shaun Mackelprang of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on **November 3, 2014**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Garamond 13-point font. The word-processing software identified that this brief contains **1879** words.

*/s/ Jessica Hathaway*

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